

REMARKS

Claims 1-29 are presently pending in the application, and are subject to an election of species requirement. The Examiner has requested that Applicant elects a species from Figure 7A (species 1); Figure 7B (species 2); Figure 7C (species 3); and Figure 7D (species 4).

Applicant respectfully traverses the Examiner's election of species requirement. Applicant respectfully submits that the restriction is improper because it ***does not comply with the criteria for an election of species***. Restriction, a generic term, includes the practice of election of species (MPEP §802.02). There are two criteria for a proper requirement for restriction between ***patentably distinct*** inventions: (A) the inventions must be independent; ***and*** (B) there must be a ***serious burden*** on the Examiner if restriction is required (MPEP §803).

The Examiner has provided no reasoning why search and examination of the four species as set forth in the instant Election of Species would result in a serious burden on the Examiner. In fact, Applicant respectfully submits that no **serious burden** can exist since the Examiner has ***already searched and examined*** the art in view of the pending claims (see Office Action mailed on December 16, 2004, rejecting claims 1-29 as anticipated by Young). Furthermore, searching Figures 7A-7D would not credibly pose a serious burden on the Examiner since the illustrations show several possible placements of the claimed implant, all in the eye.

Further, the Examiner provides no reasoned basis for the Examiner's belief that the species are patentably distinct. The Examiner merely recites that the instant application contains claims directed to Species 1-4, which the Examiner asserts are patentably distinct. The Examiner provides no explanation why this determination was reached at this point in the prosecution, well after issuance of a first Office Action on the merits, and Applicant's response thereto, which was ***made without substantive amendment to the claims***. The Examiner is respectfully reminded

that any determination of restriction or election of species is to be made "as early as possible in the prosecution." MPEP §811. Accordingly, the Examiner has failed to provide any reasonable justification for requiring the election of species.

For at least these reasons, Applicant respectfully submits that the requirement that Applicant elect a single disclosed species for prosecution on the merits is improper and, accordingly, should be reconsidered and withdrawn.

Despite Applicant's traversal, Applicant elects Species 1, Figure 7A for prosecution on the merits. Claims readable on the elected species include claims 1-14, 18-24 and 29.

Respectfully submitted,

Dated: October 3, 2005

By 

John P. Iwanicki, Reg. No. 34,628
BANNER & WITCOFF, LTD.
28 State Street, 28th Floor
Boston, MA 02109
(617) 720-9600